No. 13,118

United States Court of Appeals

For the Ninth Circuit

EDWARD J. CARRIGAN, RAY CALMES and JACK REYNOLDS,
Appellants,

vs.

UNITED STATES OF AMERICA,
Appellee.

Upon Appeals from the United States District Court for the Northern District of California, Southern Division.

BRIEF FOR APPELLEE.

CHAUNCEY TRAMUTOLO,
United States Attorney,
MACKLIN FLEMING,
Assistant United States Attorney,
Attorneys for Appellee.

JAMES M. McINERNEY,
Assistant Attorney General,
BEATRICE ROSENBERG,
EDWARD S. SZUKELEWICZ,
Attorneys, Department of Justice, Washington, D. C.,
Of Counsel.

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Upon Appeals from the United States District Court for the Northern District of California, Southern Division.

BRIEF FOR APPELLEE.

OPINION.

The oral statement of Judge Lemmon (Tr. 157-162)[1] denying the several motions of appellants for a new trial is not reported.

QUESTIONS PRESENTED.

1. Whether the evidence supports appellants' conviction under the indictment charging them with a general conspiracy.

[1]The symbol "Tr." refers to the typewritten transcript of the record on appeal; and the symbol "R." to the reporter's typewritten transcript of the trial proceedings.

2. Whether the trial Court erred in its instruction to the jury to the effect that the existence of a conspiracy among several individuals may be inferred from their steady course of individual conduct "leading to the same unlawful result".

3. Whether the trial Court abused its discretion in denying appellants' several motions for a new trial.

STATUTORY PROVISIONS INVOLVED.

18 U.S.C. 371 provides:

> If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.
>
> If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

18 U.S.C. 4082 provides in pertinent part as follows:

> Persons convicted of an offense against the United States shall be committed, for such terms of imprisonment as the court may direct, to the custody of the Attorney General of the United States or his authorized representative, who shall designate the places of confinement where the sentences shall be served.

The Attorney General may designate any available, suitable, and appropriate institutions, whether maintained by the Federal Government or otherwise, or whether within or without the judicial district in which the person was convicted.

The Attorney General may order any inmate transferred from one institution to another.

STATEMENT OF JURISDICTION.

Appellants appeal from several judgments of conviction rendered on August 23, 1951 (Tr. 166-171), after a trial before Judge Dal M. Lemmon and a jury, in the United States District Court for the Northern District of California, Southern Division (R. 1-1511-A), wherein they were found guilty (Tr. 151) upon a one-count indictment, filed April 18, 1951, which charged them and one Neider[2] with a violation of 18 U.S.C. 371, in that, during 1951, they conspired in that district to defraud the United States. (Tr. 1-3.) Motions for a new trial by Carrigan (Tr. 152-153) and Reynolds (Tr. 154-156) were denied. (Tr. 162.) Carrigan was sentenced to five years' imprisonment and to pay a $5,000 fine (Tr. 164); Reynolds to three years' imprisonment and a $3,000 fine (*id.*); and Calmes to two years' imprisonment and a $1,000 fine. (Tr. 165.)

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[2]Motion for judgment of acquittal (R. 739) was granted as to Neider at the end of the Government's case. (R. 741; Tr. 12-13.) Similar motions on behalf of appellants (R. 735-739) were denied. (R. 741-742.)

The jurisdiction of the District Court was based upon 18 U.S.C. 3231 and Rule 18, F.R. Crim. P. On August 23, 1951, Carrigan and Reynolds each filed a notice of appeal (Tr. 172-173); and on August 29, 1951, Calmes also filed a notice of appeal. (Tr. 174.) The appeals are timely. See Rules 37(a)(2) and 45(a), F.R. Crim. P. The jurisdiction of this Court to review the judgment of the trial Court rests upon 28 U.S.C. 1291 and 1294.

THE INDICTMENT.

The indictment charges a violation of 18 U.S.C. 371, 4082,[3] as follows (Tr. 1-3):

That on or about January 27, 1951, and continuously thereafter up to and including the 12th day of April, 1951, the above named defendants, Edward J. Carrigan, Ray Calmes, Jack Reynolds, and Sam Neider, did, in the Northern District of California, Southern Division, conspire together, and with Phil Davis and John Church, with the intent and purpose to defraud the United States in the exercise of its governmental powers by impairing, obstructing and interfering with the lawful functions of a Department of the United States, to-wit, the Department of Justice, the Bureau of Prisons thereof, and the Attorney General in attempting unlawfully and corruptly to influence, obstruct and impede said Attorney General and said Bureau in the designation of places of confinement where sentence shall be served and transfers made

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[3]Through inadvertence, the indictment cites 18 U.S.C. 2401.

from one institution to another in connection therewith of a federal prisoner theretofore committed to the custody of said Attorney General, said federal prisoner being one Phil Davis, convicted in the United States District Court for the Northern District of California, Northern Division, in Action No. 10,290, of having operated a motor boat on waters of Lake Tahoe in a reckless and negligent manner, contrary to the provisions of the Motor Boat Act of 1940, and sentenced to six months' imprisonment and to pay a fine of $1,500; and that during the existence of said conspiracy, one or more of the accused, as hereinafter mentioned by name, did the following acts in furtherance of and to effect the object of said conspiracy:

1. On January 27, 1951, said defendant Edward J. Carrigan met said John Church at the Phil Davis Automobile Agency, 2547 E. 14th St., Oakland, California, and they held a conversation together.

2. On or about February 1, 1951, a telephone conversation was held between said Phil Davis and said defendant Sam Neider, in the City of Oakland, County of Alameda, California.

3. On or about February 10, 1951, said Phil Davis had a conversation with said defendant Jack Reynolds near the Union Club of Oakland, 285 23rd Street, Oakland, California.

4. On April 11, 1951, said John Church had a conversation with said defendant Ray Calmes at said Phil Davis' Automobile Agency.

5. On April 12, 1951, on Mission Street between Sixth and Seventh Streets, in the City and County of San Francisco, State of California, about 2:13 o'clock in the afternoon of said day, said defendant Edward J. Carrigan had a conversation with said John Church, and said John Church delivered to the said Edward J. Carrigan the sum of $2,000 in United States currency, and said Edward J. Carrigan accepted the same.

STATEMENT OF FACTS.

The evidence adduced by the Government may be summarized as follows:

On November 7, 1949, Phil Davis,[4] an automobile dealer in Oakland, California, was sentenced in the United States District Court for the Northern District of California, Northern Division, to six months' imprisonment and to pay a $1,500 fine following his conviction on an information which had charged him with a violation of the Motor Boat Act (46 U.S.C. 526(l) and (m)), in that he had recklessly operated a motor boat on Lake Tahoe so as to have endangered the life and limb of certain individuals. (R. 17-18, 228; Gov. Ex. 1, R. 17.)

On November 29, 1949, the Director of the Bureau of Prisons, Department of Justice, Washington, D.C., had, by telegram, advised John Roseen, then acting as United States Marshal at San Francisco, that, "because of pending civil case" against Davis resulting

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[4]Davis was one of two co-conspirators named, but not indicted, with appellants in the indictment herein considered.

from the Lake Tahoe offense, the bureau had "no objection", provided the marshal and the U.S. Attorney agreed, to having Davis serve his sentence in a local jail "rather than McNeil camp", as requested by his trial counsel. (R. 147, 444-446, 448, 701-702, 705-706; Gov. Exs. 14, 22-A, 22-B, R. 447, 700.) The telegram also stated that, if service in a local jail was agreed upon, Davis' trial attorney should be notified thereof. (*Id.*) No action was taken thereon at that time, because Davis was out on bail pending an appeal from his conviction. (R. 446, 448.) On August 11, 1950, while Davis was still on bail, appellant Carrigan had been appointed U.S. Marshal for the Northern District of California, succeeding Roseen, who had reverted to his former status of chief deputy marshal. (R. 147-148, 444, 448.)

John Church,[5] a general manager of Davis' automobile agency, testified that, shortly prior to January 27, 1951, appellant Calmes, a deputy marshal in Carrigan's office,[6] visited the agency on several occasions

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[5]Church, like Davis, was also named in the indictment as to appellants' co-conspirator, but was not indicted with them. He was the first witness for the Government. (R. 19-227.) His testimony, with respect to each of his several conversations with appellants, was specifically limited to the particular appellant who had engaged therein. (R. 21, 22, 24, 741-742.) However, at the conclusion of Church's testimony, the trial Court ruled that his testimony was sufficient to establish, *prima facie*, the conspiracy charged, and consequently, the testimony of all appellants. (R. 230.)

[6]Calmes was acquainted with Church and Davis, having met them about two years previously at a marshal's automobile auction. (R. 19, 229, 260.) In 1949, Calmes had taken Davis into custody on charges arising from the Lake Tahoe accident. (R. 229, 261-262.) Subsequently, he purchased from Davis a new Chrysler, which he later customarily brought to Davis' place for servicing. (R. 20, 29, 229, 261.)

for the purpose of arranging a meeting between Davis and Carrigan, who had been interested in purchasing a new automobile. (R. 19, 20-22.) Davis testified that on one such occasion, Calmes suggested that Davis make a "deal" with Carrigan for a new Chrysler, stating that Carrigan was "all powerful" and "would be a fine connection" for Davis in view of his prospective incarceration. (R. 229-230, 231, 263.) Calmes told Davis that Carrigan could arrange for him to serve his sentence at Fairfield (the Solano County jail), where he would be able to enjoy unusual privileges since Carrigan knew its warden. (232, 302-303, 307-308, 464.) In reply to Davis' statement, that his attorney had already obtained approval from Bennett, the Director of Prisons, for his confinement at San Bruno (the San Francisco County jail), Calmes stated that, "regardless of Mr. Bennett, Mr. Carrigan will have sole charge of you and full power over you once you are remanded to his custody", adding that Carrigan could do him "as much harm" as "good". (R. 231-232, 263-264, 309, 464.) Calmes also told him that there were some "very bad places" to which he could be sent, mentioning, specifically, San Francisco jail, Leavenworth and McNeil Island. (R. 308.)

On January 27, 1951, in accordance with arrangements made by Calmes, Carrigan and Calmes visited the agency to discuss an automobile transaction with Davis, but, Davis having left town before Carrigan arrived, they discussed the matter with Church instead. (R. 23-24, 233-234, 258-260.) Carrigan, after being offered by Church a $1,150 "trade-in" allow-

ance on his 1947 Pontiac, replied, "No, you will never make a deal that way". (R. 24-25.) He followed by asking, "Well, does Mr. Davis expect to make a profit in this deal?" (R. 26.) After selecting a new Chrysler, having a list price of $3,025, Carrigan stated to Church, "I guess Mr. Davis understands that after he is arrested I will have full charge over his custody", adding, "I think Phil Davis ought to make me a straight across the board deal, trade car for car. After all, $1,500 or $2,000 doesn't mean anything to Mr. Davis". (R. 26-27.) After Carrigan had left, and prior to making his own departure, Calmes advised Church, "I think it will be worth Phil Davis' while to make that deal with Carrigan". (R. 27.) Upon learning of Carrigan's proposition, Davis became fearful lest he experience physical mistreatment in the event of his incarceration under the Lake Tahoe sentence, if he did not accede to the proposition. (R. 28, 280, 305-306.)

Several days later, Davis met appellant Reynolds,[7] who, posing as "a very close friend" of Carrigan, offered Davis a "deal", which he said was possible through Carrigan's intercession. (R. 237-238, 406-408, 418.) Davis "agreed to go along with that deal", which consisted of his paying $200 per month in consideration of his imprisonment at Fairfield, where he would be allowed a telephone, unlimited visits, and the privilege to do his own cooking. (R. 238-239, 418.)

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[7]Reynolds had been interested in Alameda County politics, to which Davis, on occasion, made financial contributions through Reynolds. (R. 318, 353-354.)

At the conclusion of this agreement, Reynolds told him that he was "making a wise move because where the marshal could help" him, "he could also hurt" him "just as much". (R. 239.) He again met Reynolds, a few days later, to reaffirm the agreement. (R. 240.)

About mid-February, 1951, although the Supreme Court had not yet ruled on Davis' petition for certiorari, Reynolds told him that he had news from Washington that Davis' petition would be denied and that he would have to commence service of his sentence in a few days. (R. 240-241, 419, 105.) Reynolds also told him that Carrigan had decided that Davis serve his sentence at Santa Rita Rehabilitation Center, a prison-farm branch of the Alameda County jail at Oakland, rather than Fairfield. (R. 241, 512.) He assured Davis that "Carrigan had very good connections" there, and that Reynolds could also help him since he was a personal friend of the sheriff in charge of that institution. (R. 242, 389-390.)[8] At that meeting, Reynolds also told Davis that he would notify him concerning the details and the date for his surrender to the marshal. (*Id.*)

Davis' petition for a writ of certiorari was denied on February 26, 1951. (R. 105.) On March 5, 1951, after being apprised by Reynolds that he would be required to surrender two days later at a time and

[8]The sheriff testified that, about two weeks prior to March 7, 1951, Reynolds had called him, stating that he thought Davis would be taken to Santa Rita and had tried to arrange for special privileges for Davis, such as a telephone and unrestricted visits from Davis' business manager. (R. 653, 654-655, 661-662.) Davis had never asked Reynolds to speak to the sheriff on his behalf. (R. 278.)

place convenient for him, Davis advised Reynolds that he would surrender at 2:00 p. m. on March 7, at a certain street intersection within several blocks from his place of business. (R. 242-243.) Although Davis had no official information from any source, and had not communicated with the marshal's office concerning his surrender rendezvous, he was taken into custody by Calmes at the appointed time and place and delivered directly to Santa Rita. (R. 30, 243-245.) He was allowed to surrender on a street corner in order to avoid newspaper photographers and reporters, who had caused him adverse publicity since the Lake Tahoe incident. (R. 485.)[9]

On March 11, 1951, when Church first visited Davis at Santa Rita, Davis instructed him to cancel Davis'

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[9]In the latter part of February 1951, Roseen had shown Carrigan Bennett's telegram and conferred with him concerning a place for Davis' confinement. (R. 448-449, 486, 489, 490.) Carrigan, after further discussing the matter with the U.S. Attorney, told Roseen that he thought he had sufficient authority to act thereon. (R. 449-450.) The authority contained in the telegram had never been revoked. (R. 456.)

According to the Marshal's Manual, the standing instructions for Carrigan's office were to commit federal prisoners required to serve sentences of less than three months for convictions of misdemeanors to the nearest approved jail; and those required to serve three months or more to McNeil Island Prison Camp, unless special authority for local incarceration had been granted, as in Davis' case. (R. 461-463, 514, 733; Gov. Exs. 15, 16, R. 475.) Fairfield and San Bruno were the local jails ordinarily used by Carrigan's office. (R. 464.) Alameda County jail, although accredited, was not utilized because of its inconvenient location. (*Id.*) Santa Rita, prior to Davis' commitment there, never had any male prisoners, although it was not necessarily restricted to female inmates. (R. 457, 660.) Roseen testified that he understood that Davis was to be placed in the Alameda County jail. (R. 458, 494.) He did not know that Davis had been taken to Santa Rita until a sheriff from that institution had called him to inquire why Davis had not been processed through the main branch. (R. 458, 483, 494-495.) It seems that Davis was taken directly to Santa Rita to avoid publicity. (R. 330.)

agreement with Reynolds because he was not receiving any "special benefits" as had been promised. (R. 321-323.)

On March 16, 1951, Reynolds visited Davis at Santa Rita and told him that "Carrigan was very angry because he had received no money," and that Davis would be on the "train leaving for McNeil Island Penitentiary the following Wednesday," if Carrigan was not paid $500 "immediately." (R. 245-246; Gov. Ex. 2, R. 34-35, 99-100.)[10] A few days later, on instructions from Davis, Church forwarded $500 in cash to Reynolds. (R. 39-40, 50-52, 246-247; Gov. Exs. 3-A, 3-B, R. 52.) However, on March 26, 1951, Reynolds returned the money, upon Church's request, after Davis had declined to accede to Reynolds' demands for the payment of an additional sum of $500. (R. 46-50, 52, 189.) At the same time, Church threatened Reynolds that, if any attempt was made to move Davis from Santa Rita, he would notify "the proper authorities" of the facts surrounding Davis' incar-

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[10]Before Carrigan made a trip to Washington on March 19, 1951, Roseen had asked him to check with Bennett, the Director of the Bureau of Prisons, as to the propriety of Davis' imprisonment in Santa Rita. (R. 468, 499.) Roseen had felt that, in view of the date of the telegram and the absence, on March 7, of the reason given therein for local imprisonment of Davis, his civil suit having been settled prior to that date, the marshal should have had further approval of the action taken. (R. 498.) Upon his return on March 22, Carrigan told Roseen that their action had the approval of Mr. Bennett (R. 469, 499, 500.) However, Mr. Bennett testified that Carrigan had never discussed the Davis case with him, save to remark that he was having some trouble with a prisoner, in an Oakland jail, who had been demanding special privileges, in response to which Bennett had advised the marshal to transfer the prisoner, lest he suffer embarrassment. (R. 709-712.)

ceration. (R. 50-51, 196-201, 205-207.)[11] In reply, Reynolds told him that orders for Davis' transfer had already been issued the day before. (R. 51.) On March 27, 1952, Church, in a telephone conversation, told Reynolds that Davis felt he was being "badly abused," to which Reynolds replied that as far as he was concerned he was "through" with Davis. (R. 56.)

On March 30, 1951, a deputy marshal, on Carrigan's orders, instructed the sheriff's office at Santa Rita to have Davis prepared for transfer to McNeil Island within three days. (R. 516-519, 526, 529-531, 538.) Carrigan told the deputy to have the sheriff inform "Davis that if he has any business to transact he had better do it soon." (R. 530.) Accordingly, that day, the sheriff alerted Davis for transfer. (R. 656, 658.) Actually, no orders had been issued for Davis' transfer to McNeil Island. (R. 210, 469.) Although the marshal had discretionary power to transfer Davis, for reasons of his welfare, from Santa Rita to another local jail, he had no such power, without special authorization from the Director of the Bureau of Prisons, to transfer him to McNeil Island Prison Camp under any circumstances. (R. 480-481, 515.)

On April 5, 1951, Church, pursuant to instructions from the F.B.I., telephoned Calmes to inquire concerning reports of Davis' transfer to McNeil Island. (R. 57, 73-74, 111.) The following day Calmes confirmed

[11]Later that day, Davis and Church gave statements to the F.B.I. concerning the demands for money made upon Davis. (R. 92, 170, 197, 250, 251, 253, 286; Gov. Exs. 7-11, R. 122, 443, 444.)

those reports and accused Church of circulating rumors that Carrigan had been taking bribes. (R. 58-59.)

On April 10, 1951, Calmes appeared at Santa Rita armed with a mandate for Davis' removal to Fairfield. (R. 247, 475, 540, 543-544; Gov. Exs. 17-20, R. 471, 543-545.) He told Davis that Carrigan desired some of the bribe money which it had been rumored Davis was paying, or, in lieu thereof, a new car in exchange for his used car, and that, in addition, Carrigan wanted Calmes to be paid $500. (R. 248-249, 325, 334, 336-337.) Calmes also told Davis that he had dissuaded Carrigan from ordering Davis' removal to McNeil Island Penitentiary and obtained the transfer to Fairfield. (R. 249, 333.) Davis remonstrated with Calmes about his removal and promised to pay the money previously requested by Reynolds if he were permitted to remain at Santa Rita unmolested. (R. 249, 338-339.) Calmes stated that he had to check the matter with Carrigan. (R. 249-250, 338-339.) Having done so, he left without executing the transfer orders. (R. 65, 249-250, 546, 338-339, 438-442, 475; Gov. Exs. 12-13, R. 439, 442.)[12]

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[12]On April 9, Carrigan informed Roseen of verbal reports that Davis was unable to "get along" at Santa Rita and suggested his transfer. (R. 471, 472-474.) Roseen concurred in the suggestion in consideration of Davis' welfare, and the following day prepared the necessary orders, which were signed by Carrigan, for Davis' transfer to Solano County jail (Fairfield). (R. 470-472, 473-474, 503-504; Gov. Ex. 17, R. 471.) A day later, Carrigan told Roseen that the orders were not executed and were to be canceled, because Davis had "made his peace" and did not desire to leave Santa Rita. (R. 474, 506-507.)

On April 11, 1951, Calmes reported to Church that it had been determined that Davis pay the marshal's office $2,000. (R. 65-66.) On April 12, 1951, pursuant to instructions from the F.B.I., Church reported to Calmes that Davis had authorized the payment of that amount, on condition that the money be delivered by Church to Carrigan personally. (R. 67, 73-74.) Later that day, Carrigan called and arranged with Church to personally receive payment from Church. (R. 68.) On that day, Carrigan was arrested by agents of the F.B.I., after Church had handed him $2,000, at the appointed time and place outside the Federal Building in San Francisco. (R. 71-73, 555-557, 559, 562, 581-583, 595-598, 615-619; Gov. Exs. 6, 6-A, 21, R. 563, 562, 564-565, 614.)[13]

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[13]In handing the money to Carrigan, Church exorted him to promise that he would not make additional demands for money, to which Carrigan replied, "I don't operate that way." (R. 119.) Immediately upon apprehension, Carrigan made several statements, which had been admitted in evidence only as against him. (R. 566.) To two of the arresting officers, Carrigan remarked, "Yes, yes, I have been expecting you." (R. 558, 583.) When asked to surrender the money, he stated, "You can't have that, that is evidence." (R. 584, 598.) On the way to the F.B.I. office, he remarked, "Well, I guess I made one mistake, I should have called Kimball," the Special Agent in Charge of the San Francisco office of the F.B.I. (R. 584-585, 595-596, 598-599.) When informed that Kimball was one of the arresting agents, Carrigan told him, "You will find a message waiting for you from me at your office." (R. 599, 585.) Kimball's office staff testified that no calls or messages from Carrigan had come in that day. (R. 599-600, 621-626, 631, 632, 634-636, 637-639, 640-646, 648-650.)

Later that day, upon being interviewed by newspaper reporters, Carrigan explained that he knew that Davis was paying bribes and that Carrigan had taken the money as part of his investigation on authority from the Director of the Bureau of Prisons, who had requested him to personally uncover the guilty persons. (R. 664-667, 680-682, 689-693.) Testimony concerning these statements was limited to Carrigan. (R. 665.) Bennett testified that he had never

ARGUMENT.

I.

THE EVIDENCE IS AMPLY SUFFICIENT TO SUSTAIN THE JURY'S FINDING THAT THERE WAS A SINGLE, GENERAL CONSPIRACY IN WHICH ALL APPELLANTS PARTICIPATED.

The principal question presented herein is the sufficiency of the evidence to support the jury's finding that all the appellants had engaged in a single conspiracy to deprive the United States of its right to the faithful and lawful services of one of its marshals. Appellants severally contend, on the basis of *Kotteakos v. United States,* 328 U.S. 750, and *Canella v. United States,* 157 F. (2d) 470 (C.A. 9), that there was prejudicial variance between the proof and the indictment because the indictment charged a single general conspiracy and the evidence, according to them, tends to prove several independent, though similar, conspiracies.[14] Their contentions are clearly without merit.

We submit that there is an abundance of evidence, as outlined in the Statement of Facts, *supra,* from which the jury could have concluded that there was but one continuous and persistent conspiracy to defraud the Government. The indictment charges but one conspiracy, with five specified overt acts, in a

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discussed with Carrigan the Davis case or any alleged bribery connected therewith, nor had he ever authorized Carrigan to conduct any investigation. (R. 711-712.)

[14]Carrigan (Br. 17-26); Calmes (Br. 17-24). Reynolds (Br. 23-36), however, goes further in his contention. He claims that the evidence not only fails to prove a general conspiracy, but also that there is no competent evidence to show his participation in any of the isolated conspiracies, which, according to him, the evidence proves.

single count, and the trial judge submitted the case to the jury on the basis of a single conspiracy. His specific instructions in this respect were:

> In considering the charge of conspiracy contained in the indictment I instruct you that the defendants are not on trial for doing any of the overt acts alleged in the indictment. They are only on trial for unlawfully conspiring together. Unless you find to a moral certainty and beyond a reasonable doubt that the defendants did so conspire together, as charged in the indictment, you must return a verdict finding the defendants not guilty even though you should also find that one or more of the defendants did one or more of the overt acts set forth in the indictment.
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> An indictment charging a specified crime cannot be supported or proved by proof of a different crime. If you find that two or more of the defendants entered into some conspiracy somewhere at some time but that they did not enter into the conspiracy charged in the indictment then you must acquit them of the conspiracy charged in the indictment.

The jury, therefore, must have concluded that the evidence did establish a single conspiracy.

Appellants do not deny that in examining the record this Court must consider the evidence in the light most favorable to the Government, giving it the benefit of all inferences which reasonably may be drawn therefrom. See *Taylor v. Mississippi,* 319 U.S. 583, 585-586; *Craig v. United States,* 81 F. (2d) 816,

827 (C.A. 9), certiorari denied, 298 U.S. 690; *Curley v. United States,* 160 F. (2d) 229 (C.A.D.C.), certiorari denied, 331 U.S. 837. The evidence clearly shows that on January 27, 1951, under color of his office as U. S. Marshal, Carrigan, aided and abetted by Calmes, had attempted to intimidate Davis, a potential federal prisoner, into giving him a new Chrysler in exchange for his used Pontiac, under threat of official reprisal. Thus, from the evidence, properly limited as against Carrigan and Calmes, showing the various circumstances surrounding the January 27 episode alone, the jury could have properly inferred that, on or about that day, Carrigan and Calmes had entered upon a joint scheme, based upon a violation of the public trust reposed in them and the concomitant impairment of the lawful functions of an agency of the United States, to extort something of value from Davis. Cf. *Green v. United States,* 28 F. (2d) 965 (C.A. 8); *United States v. Furer,* 47 F.Supp. 402 (S.D. Cal.). Their acts, done in pursuance of an apparent criminal purpose, certainly permitted an inference of at least a tacit understanding between them. *Marino v. United States,* 91 F. (2d) 691 (C.A. 9), certiorari denied, 302 U.S. 764. Indeed, it has been consistently held that the existence of a conspiracy may be inferred from acts done in pursuance of an apparent criminal intent, and the mere fact that a conspiracy has been inferred from circumstantial evidence does not render such evidence insufficient. *Blumenthal v. United States,* 332 U.S. 539, 549; *Stillman v. United States,* 177 F. (2d) 607, 615 (C.A. 9); *Rose*

v. United States, 149 F. (2d) 755, 759 (C.A. 9). As the Supreme Court pointed out in *Direct Sales Co. v. United States,* 139 U.S. 703, 714, proof of conspiracy "by the very nature of the crime, must be circumstantial and therefore inferential to an extent varying with the conditions under which the crime may be committed." The fact that the January 27 incident was also specified as one of the overt acts, did not render it incompetent as evidence proving the conspiracy. *American Tobacco Co. v. United States,* 328 U.S. 781, 789; *United States v. Holt,* 108 F. (2d) 365, 368-369 (C.A. 7), certiorari denied, 309 U.S. 672.

The jury, having found the existence of the conspiracy between Carrigan and Calmes, was justified in further finding that the conspiracy did not terminate with the visit to Davis' agency on January 27. It could have concluded from all the evidence before it that the agreement between the marshal and his deputy was to pursue their plan until it reached maximum fruition.[15] Difficulty experienced in accomplishing the object of the conspiracy is not conclusive of the termination of the agreement to act in concert. *United States v. Rollnick,* 91 F. (2d) 911, 918 (C.A. 2). It is evident from their acts that Carrigan and Calmes did not intend to abandon their undertaking after their fruitless encounter with Church on January 27. Their apparent design had been to make

[15]Such an inference is possible from the statement, "I don't operate that way," made by Carrigan in reply to Church's exhortation that he promise not to make additional demands for money, after being paid $2,000 on April 12.

a "deal" with Davis, whom they failed to meet on that day. They still desired to approach Davis, or, at least, to have Church communicate their proposition to him for his personal consideration. This clearly appears from the advice, "I think it will be worth Phil Davis' while to make that deal with Carrigan," which Calmes gave to Church upon making his departure. Thus, the purpose of the conspiracy being a continuing one, the conspiracy itself must have been of the same nature. Indeed, once a conspiracy is established, it may properly be inferred to continue until consummation of its purpose or until its abandonment. *United States v. Kissel,* 218 U.S. 601; *Marino v. United States,* 91 F. (2d) 691 (C.A. 9), certiorari denied, 302 U.S. 764; *Nyquist v. United States,* 2 F. (2d) 504 (C.A. 6), certiorari denied, 267 U.S. 606.

With the conspiracy so continuing, the jury could have found that, several days later, it had entered its second phase with Carrigan's enlistment of appellant Reynolds into the conspiracy in his determined effort to make a "deal" with Davis through Reynold's intervention. The evidence shows that Reynolds, posing as "a very close friend" of Carrigan, had offered to obtain, through Carrigan, some prison privileges for Davis for $200 a month. It further shows that Reynolds had complimented Davis on his "wise move" in acceding to his proposition, observing that the marshal could hurt him as much as he could help. Thus, the evidence warrants an inference that Reynolds also became a member of the conspiracy

with Carrigan and Calmes to obtain a bribe from Davis. That inference as to Reynolds' part in the conspiracy becomes stronger, in fact almost inescapable, from the evidence of his subsequent meetings and conversations with Davis. He not only informed Davis in advance that Santa Rita was to be his place of confinement, but he alone arranged the details as to time and place for Davis' surrender at a time when Davis was incommunicado and had no official information concerning his surrender from any other source. Calmes took Davis into custody strictly in accordance with the arrangements made by Davis with Reynolds. This clearly points to a close liaison between Reynolds and Carrigan's office.

Further evidence also supports the permissible inference implicating Reynolds in the conspiracy. It shows that, within ten days following Davis' imprisonment, Reynolds visited him at Santa Rita to tell him that "Carrigan was very angry because he had received no money," and that he would be transferred to McNeil Island Penitentiary, if Carrigan was not paid $500 "immediately." This inaugurated a third phase of the same conspiracy to accomplish the same object of extorting money from Davis, this time by playing upon his fear of being transferred to a dangerous place. On March 26, 1951, following Davis' refusal to accede to Reynolds' demands for an additional sum of $500, Reynolds returned, at Church's request, the $500 previously paid him, telling Church that he was "through" with Davis. Reynolds' unusual familiarity with activities of Carrigan's office

is evidenced by the fact that on March 26 he told Church that Carrigan had already prepared orders for Davis' transfer to McNeil Island. The fact is that, on March 30, Carrigan directed the sheriff at Santa Rita to prepare Davis for a transfer to McNeil Island.

Thus, there is an abundance of evidence directly relating to Reynolds to warrant the conclusion that he had joined and actively participated in the conspiracy originally hatched between Carrigan and Calmes to get money from Davis. Proof of his participation in the conspiracy rests, not upon admissions and declarations, as he contends (Br. 28), but upon direct evidence concerning his own acts. Evidence of his meetings and conversations with Church and Davis tended directly to prove facts of his particular dealings and relations with them. His conversations with them were not in the nature of confessions or declarations; they were overt acts. The rule is that participation in a conspiracy may not be proved by the declarations of a co-conspirator. Thus, a statement by A to C that B is a member of a conspiracy would not be enough to establish B's membership. But there is no rule of law which prohibits A's testimony on the witness stand as to what B actually did from being considered to establish B's participation.

Overt acts may be considered in determining whether a conspiracy existed. *United States v. Holt,* 108 F. (2d) 365, 368-369 (C.A. 7), certiorari denied,

309 U.S. 672; see also *American Tobacco Co. v. United States,* 328 U.S. 781, 789. Reynolds' statements to Davis and Church were acts from which the fact of such a conspiracy, and his participation therein, could be inferred. See *Glasser v. United States,* 315 U.S. 60, 80; *United States v. Holt,* 108 F. (2d) 365 (C.A. 7), certiorari denied, 309 U.S. 672. Indeed, "Participation in a criminal conspiracy need not be proved by direct evidence; a common purpose and plan may be inferred from a 'development and a collocation of circumstances.'" *Glasser v. United States, supra.* Once a continuing conspiracy between Corrigan and Calmes had been established, slight evidence would have been sufficient to connect Reynolds therewith. *Phelps v. United States,* 160 F. (2d) 858, 867-868 (C.A. 8), certiorari denied, 334 U.S. 860; *Meyers v. United States,* 94 F. (2d) 433, 434 (C.A. 6), certiorari denied, 304 U.S. 583. Here, the evidence, showing a pattern of action on the part of Reynolds, completely dovetailing the pattern set in motion by Carrigan and Calmes, was more than sufficient to show concert of action.

It was a question of fact for the jury, as the trial Court properly instructed it, to determine whether or not Reynolds had affirmatively disassociated himself from the conspiracy on March 26, 1951. However, in view of his active participation in the conspiracy up to that time, the fact of such disassociation would have no effect on his responsibility, arising from the extent of his participation therein.

On March 26, 1951, the conspiracy entered into its fourth and final phase, although Church and Davis had withdrawn themselves from it on that date by notifying the F.B.I. During this period Calmes demanded that Davis pay $2,000 to Carrigan, and Carrigan, in accordance with his own arrangements with Church, received payment of the money on April 12, 1951, at which time he was arrested by the F.B.I.

Thus, the jury had before it substantial evidence from which, in the exercise of its right to draw proper inferences, it could reasonably conclude that there was a single persistent conspiracy to defraud the Government by extorting money from Davis, which continued from the initial demands on Davis to the time of Carrigan's arrest. Carrigan and Calmes were at all times members of this conspiracy and Reynolds, although he may have joined later and left earlier, did actively participate therein. Reynolds seems to be under the erroneous impression that in order to find him guilty of the conspiracy charged, it was necessary to prove that all appellants had entered into the conspiracy simultaneously on January 27 and together continued therein until April 12. That, however, is not the law. Once a conspiracy has been formed, the addition of a new member does not change the status of the original conspirators or create a new conspiracy. The new member, not only becomes responsible for all succeeding acts of the conspiracy, but adopts all of the preceding acts which the original conspirators performed in furtherance thereof. *Nor-*

ton v. United States, 295 Fed. 136 (C.A. 5); *Bryant v. United States,* 257 Fed. 378 (C.A. 5).

Appellants' contentions that the evidence proves a series of isolated conspiracies is in reality an attempt to have this Court credit their own testimony, which the jury, by its verdict, did not credit. Thus, Carrigan and Calmes each contend that their visit on January 27 to the Davis agency was in pursuit of a lawful business transaction, which ended then and there without a meeting of the minds; but if the jury did not believe the initial visit was for a lawful purpose, appellants' contention that the visit was a separate, isolated occurrence, loses its force. Calmes further contends that his activities between April 5 and April 12 were solely in his official capacity as a deputy marshal acting under orders of Carrigan. The fact that he was Carrigan's subordinate would not, however, preclude the formation of a conspiracy between them. Cf. *Hyde v. United States,* 225 U.S. 347, 368. Carrigan contends (Br. 14) that his "avowed purpose" in accepting the $2,000 from Church was "To bring out into the open some one, unknown, or one or more unknown people who apparently were putting pressure on either Davis or Church, or both, with direct threats of doing something to Davis." It is difficult, indeed, to visualize how the receipt by a law enforcement officer of payment from an alleged extortion victim would lead to the apprehension of the extortionist, and the jury obviously did not credit such testimony.

Reynolds insists (Br. 29) that his relations with Church and Davis between February and March 26, 1951, "had reference to a plan whereby a representative was to go to Washington on behalf of Davis, at an expense of $1,000, and there present to the Director of Prisons in person a proper application and showing and obtain from the Director of Prisons authorization for imprisonment of Davis in a local jail." It is similarly difficult to perceive the reason why Davis would desire to pay someone to intercede on his behalf to Washington for authority for local imprisonment during March 1951, when his attorney had already obtained such authority in November 1949. The jury quite naturally rejected this version. It is the function of the jury, and not of an Appellate Court, to draw inferences from the evidence. The verdict, if supported by evidence from which inferences may reasonably be drawn to establish guilt beyond a reasonable doubt, will not be disturbed merely because, by indulging in every possible inference in favor of a defendant, it is possible to devise an innocent explanation for his conduct. *Glasser v. United States,* 315 U.S. 60, 80; *United States v. Socony-Vacuum Oil Co.,* 310 U.S. 150, 254; *Gorin v. United States,* 312 U.S. 19, 32. Particularly, as Justice Douglas put it in *Nye & Nissen v. United States,* 336 U.S. 613, 617, an Appellate Court "could not reverse them if that theory taxed their credulity."

The jury was required, in order to convict, to find a single conspiracy. They had before them evidence that all three appellants had participated in a con-

certed effort to obtain money from Davis. Although each of them did not participate in all of the four approaches utilized to attain the common objective, yet the evidence is sufficient to connect them with one another and with the ultimate objective. The verdict is thus amply supported by the evidence.

II.

THE TRIAL COURT COMMITTED NO REVERSIBLE ERROR IN ITS INSTRUCTIONS TO THE JURY.

At the close of the charge to the jury, appellants severally entered their objections (R. 1499-1501), and now assign as error an excerpt from a portion of the charge, which in full context appears as follows (R. 1484-1485):

> The evidence in proof of a conspiracy will generally, from the nature of the case, be circumstantial. Though the common design is the essence of the charge, it is not necessary to prove that the defendants came together and actually agreed in terms to have that design and to pursue it by common means. If it be proved that the defendants pursued by their acts the same object, often by the same means, one performing one part and another another part of the same so as to complete it, with a view to the attainment of that same object, you would be justified in the conclusion that such persons were engaged in a conspiracy. Nor is it necessary to prove that the conspiracy originated with all of the defendants, or that they all met during the process of its con-

coction; for every person entering into a conspiracy or common design already formed is deemed in law a party to all acts done by any of the other parties before or afterward, in furtherance of the common design. *Although, as I have stated, a common design is the essence of the charge, such design may be made to appear when the defendants steadily pursue the same object, whether acting separately or together by common or different means, all leading to the same unlawful result.*

If the evidence of the separate details of the transaction as it was carried out indicates with the requisite certainty the existence of a preconceived plan and purpose, that is sufficient to permit you to infer that the illegal agreement charged was in fact entered into. [Emphasis supplied.]

Appellants severally contend, in effect, that the italicized portion of the charge[16] is objectionable because it authorized their conviction of a general conspiracy on evidence which the jury could have found proved several independent conspiracies. Consequently, they claim that, under the rulings in *Kotteakos v. United States,* 328 U.S. 750, and *Canella v. United States,* 157 F. (2d) 470 (C.A. 9), such alleged error requires a reversal of the judgments of conviction. We submit that the contentions are totally devoid of merit. Not only the quoted part of the charge

[16]Carrigan (Br. 26-27); Calmes (Br. 24-25); and Reynolds (Br. 36-39), who, in addition to the italicized excerpt, ascribes error to the second and third sentences of the above quoted portion of the charge.

but the italicized portion thereof correctly summarizes the established law on the subject relating to the proving of conspiracies by circumstantial evidence. *Blumenthal v. United States,* 332 U.S. 539; *United States v. Randall,* 164 F. (2d) 284 (C.A. 7), certiorari denied, 333 U.S. 856; *Phelps v. United States,* 160 F. (2d) 858 (C.A. 8), certiorari denied *sub nom. Peters v. United States,* 334 U.S. 860; *United States v. Potash,* 118 F. (2d) 54 (C.A. 2), certiorari denied, 313 U.S. 584; *United States v. Holt,* 108 F. (2d) 365 (C.A. 7), certiorari denied, 309 U.S. 672; see also: *American Tobacco Co. v. United States,* 147 F. (2d) 93 (C.A. 6), affirmed, 328 U.S. 781; *Lefco v. United States,* 74 F. (2d) 66 (C.A. 3).

There is nothing in the portion of the charge to which objection is made to warrant an inference, as appellants contend, that concerted action is not a requisite element in the crime of conspiracy. On the contrary, the trial Court in a rather lucid way said just that in the portion in which Reynolds alone finds objection, when it stated, "If it be proved that the defendants pursued by their acts the same object, often by the same means, *one performing one part and another another part of the same so as to complete it, with a view to the attachment of that same object,* you would be justified in the conclusion that such persons were engaged in a conspiracy." (Emphasis supplied.) Indeed, the portion of the charge to which all appelpellants object specifically refers to the preceding portion just quoted, which it summarizes.

Furthermore, there is nothing in the entire charge from which it may fairly be inferred that the jury was instructed to find appellants guilty on evidence other than that showing the single conspiracy charged. On the contrary, the following portions of the charge were calculated so that there would be no misunderstanding in this respect:

> Each defendant in this case is individually entitled to, and must receive, your determination whether or not he was a member of the alleged conspiracy, if any existed, and as to each defendant you must determine whether or not he was a conspirator, as alleged, by deciding whether or not he wilfully, intentionally and knowingly joined with any other or others in an agreement or understanding having the elements of a criminal conspiracy as I have stated them to you. If you have a reasonable doubt as to any of these essential elements as to a defendant you should find him not guilty. (R. 1488.)
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> * * * * * * *
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> An indictment charging a specified crime cannot be supported or proved by proof of a different crime. If you find that two or more of the defendants entered into some conspiracy somewhere at some time but that they did not enter into the conspiracy charged in the indictment then you must acquit them of the conspiracy charged in the indictment. (R. 1490.)

Finally, there is no basis to appellant Reynolds' allegations of error (Br. 38) with respect to the portion of the charge relating to overt acts. It correctly states the law. *Braverman v. United States,* 317 U.S.

49; *United States v. Holte,* 236 U.S. 140, 144; *United States v. Johnson,* 165 F. (2d) 42 (C.A. 3), certiorari denied, 332 U.S. 852; *Holmes v. United States,* 134 F. (2d) 125 (C.A. 8), certiorari denied, 319 U.S. 776. Reynolds could not have been prejudiced thereby, especially in view of the following portion of the charge, which shortly preceded that portion to which he objects (R. 1488):

> In considering the charge of conspiracy contained in the indictment I instruct you that the defendants are not on trial for doing any of the overt acts alleged in the indictment. They are only on trial for unlawfully conspiring together. Unless you find to a moral certainty and beyond a reasonable doubt that the defendants did so conspire together, as charged in the indictment, you must return a verdict finding the defendants not guilty even though you should also find that one or more of the defendants did one or more of the overt acts set forth in the indictment.

III.

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DENYING THE APPELLANTS' SEVERAL MOTIONS FOR A NEW TRIAL.

As shown in points I and II, *supra,* the judgments of conviction against the appellants are based upon substantial evidence, and correct instructions to the jury. Thus, the trial Court did not abuse its discretion in denying appellants' several motions for a new trial.

CONCLUSION.

Wherefore, the Government respectfully submits that the judgments of conviction against the several appellants be affirmed.

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April 18, 1952.

CHAUNCEY TRAMUTOLO,
United States Attorney,
MACKLIN FLEMING,
Assistant United States Attorney,
Attorneys for Appellee.

JAMES M. MCINERNEY,
Assistant Attorney General,
BEATRICE ROSENBERG,
EDWARD S. SZUKELEWICZ,
Attorneys, Department of Justice, Washington, D. C.,
Of Counsel.